

1954

November 5

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SEP 22 1998

CONCORD, N.H.

Mr. Lawton B. Chandler, Secretary
State Tax Commission
State House
Concord, New Hampshire

Dear Sir:

You have recently invited our attention to that part of R.L. c. 85, s. 9 which permits a bank subject to the tax imposed by that chapter to deduct from its taxable deposits "the amount invested in United States bonds, and in bonds, notes, or debentures the principal or interest of which is guaranteed by the United States . . ."; you inquire whether funds invested in mortgage or real estate outside the state may be included in such deduction when the mortgages are insured under the National Housing Act (Tit. 12 U.S.C.A., s. 1701, et seq). We answer in the negative.

The Act above cited created the Federal Housing Administration, and gave that agency the power to insure certain mortgages in the hands of qualifying mortgagees. "The Federal Housing Administration was given authority to insure mortgages in order to make them safe and attractive investments for idle funds." 33 Op. Atty. Gen. U.S., 258, 262. An examination of the statute clearly demonstrates that the protection given to mortgagees thereby is vastly different from that provided under a guaranty, as that term is generally understood.

A guaranty is "an undertaking or promise on the part of one person which is collateral to a primary or principal obligation on the part of another, and which binds the obligor to performance in the event of nonperformance by such other, the latter being bound to perform primarily." 24 Am. Jur., Guaranty, s. 2. Congress was cognizant of the meaning of the word as set forth above, and used the word in the National Housing Act when it provided that debentures issued by the Federal Housing Administration itself should be "fully and unconditionally guaranteed as to principal and interest by the United States, and such guaranty shall be expressed on the face of the debenture." Tit. 12, U.S.C.A., s. 1710(d).

Mr. Lawton B. Chandler, Secretary

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No similar intent to be bound as guarantor is found on the part of the United States with respect to the notes of individual mortgagors. While measured by the obligation of an individual mortgagor in the case of default, the obligation of the Federal Housing Administration is entirely separate from it and is in fact and in law the obligation of an insurer assumed upon the consideration of a premium. See Tit. 12 U.S.C.A., s. 1709(c).

The notes of individual mortgagors secured by mortgages on out-of-state real estate, although the mortgagees be insured by the Federal Housing Administration as to the payment of the same, may not, then, be deducted from the amount of taxable deposits when the mortgagee is a bank subject to the tax imposed by R.L. c. 85.

Very truly yours,

Warren E. Waters
Deputy Attorney General

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